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THE HONORABLE FRED VAN SICKLE

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON AT RICHLAND

| | |
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| JAMES S. GORDON, JR,<br><br>Plaintiff,<br><br>v.<br><br>IMPULSE MARKETING GROUP, INC.,<br><br>Defendant<br><br>IMPULSE MARKETING GROUP, INC.,<br><br>Third Party Plaintiff<br><br>v.<br><br>BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, EMILY ABBEY, and LEW REED<br><br>Third Party Defendants | NO. CV-04-5125-FVS<br><br>LR 56.1 STATEMENT OF FACTS RELATED TO PLAINTIFF'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT<br><br>Jury Trial Demanded |

COMES NOW the Plaintiff, James S. Gordon, Jr., and files this statement of facts pursuant to LR 56.1(c). Previously, the Plaintiff had submitted the affidavit of James S. Gordon, Jr. and the affidavit of Eric Castelli in support of Plaintiff's motion to dismiss, or in the alternative, for summary judgment. In response, the Defendant has filed the declaration of James A. Bodie (hereafter the "Bodie Declaration"), which includes as an attachment Rule 26(a) disclosures filed by the Plaintiff in a prior lawsuit (the Rule 26(a) disclosures). The Defendant had also previously filed the declaration of Mr. Philip Huston. These documents currently form the entire factual basis for each of the respective parties' contentions before the court.

As the Defendant has made a habit of untimely filings throughout the course of this litigation[1], the Plaintiff hereby objects to any further filings by the Defendant attempting to alter, augment or add to the factual record now before the Court prior to the motion being heard October 12, 2005, and hereby respectfully moves the Court to strike any such filings.

Pursuant to LR 56.1(c), and based on the forgoing declarations and submissions, the Plaintiff hereby sets forth its statement of the facts.

[1] An example of one such filing is "Defendant's Additional Supplemental Response RE: Defendant's Motion to Dismiss" filed May 20, 2005

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Plaintiff's Fact #1

On or about May of 1998, Mr. Gordon registered the domain name "gordonworks.com" and began using it to make information relating to job searching and career development available to the general public on the internet. Mr. Gordon also began using the email address gordonworks@gordonworks.com Gordon Declaration, ¶ 2

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #2

In addition to the email address "gordonworks@gordonworks.com" Mr. Gordon created numerous other email addresses, all using the gordonworks.com domain. These included msm@gordonworks.com, cash@gordonworks.com, goals@gordonworks.com, business@gordonworks.com, jobs@gordonworks.com, marketer@gordonworks.com, localbusiness@gordonworks.com, peace@gordonworks.com, postmaster@gordonworks.com, referral@gordonworks.com, webmaster@gordonworks.com, genesis@gordonworks.com, teen@gordonworks.com, telecom@gordonworks.com, emily@gordonworks.com, bonnie@gordonworks.com, bonniegg@gordonworks.com, bonniefaye@gordonworks.com, jeg@gordonworks.com, jay@gordonworks.com, jamila@gordonworks.com, jonathan@gordonworks.com, jim@gordonworks.com, james@gordonworks.com. Gordon Declaration, ¶ 3

The Defendant has not contested, and therefore has admitted this fact.

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Plaintiff's Fact #3

Many of these email addresses were published on the internet on various web pages Mr. Gordon created.

Gordon Declaration, ¶ 4

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #4

Almost as soon as each of these email addresses was published on the internet, Mr. Gordon began receiving commercial email at these addresses.

Gordon Declaration, ¶ 5

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #5

The addresses for Mr. Gordon's family members, bonnie@gordonworks.com, jay@gordonworks.com, jamila@gordonworks.com, jonathan@gordonworks.com, jim@gordonworks.com, james@gordonworks.com, were all published on the internet on web pages Mr. Gordon built for his family.

Gordon Declaration, ¶ 6

The Defendant has not contested, and therefore has admitted this fact.

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Plaintiff's Fact #6

Although the web pages are related to Mr. Gordon's family members, all of them were created and maintained by Mr. Gordon, and email sent to any of these email addresses is and was received by Mr. Gordon.

Gordon Declaration, ¶ 7

The Defendant has not contested, and therefore has admitted this fact. However, at paragraphs 25-30 of the Bodie declaration, Mr. Bodie has alleged that this fact is somehow inconsistent with Mr. Gordon's Rule 26(a) disclosures in the prior lawsuit, and has further alleged that this purported inconsistency raises issues of material fact. Mr. Bodie is apparently upset about the language in these disclosures where Mr. Gordon stated that each of the Third Party Defendants "may have discoverable information regarding the facts pertinent to this lawsuit, including, but not limited to information related to the receipt of emails from the Defendant or agents acting at the behest of the Defendant by [each of the Third Party Defendants] at an email address at "gordonworks.com"." Mr. Bodie is apparently of the mind that such a statement would be inconsistent with Mr. Gordon's representation that he also received commercial email from the Defendant at these same email addresses.

In fact, there is no inconsistency. In fact, BOTH Mr. Gordon and the Third Party Defendants received emails from the Defendant at these email addresses.

Apparently, the Defendants are unable to fathom the idea that one person might share an email address with another person, or transfer an email address to another

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person. However, these concepts are easily grasped by the millions of people across the world who do, in fact, share email addresses, or who have, in fact, transferred them. Sometimes, these email addresses provide hints that they are shared. For example, one might reasonably expect that email addresses such as “Smithfamily@aol.com,” “3kidsandadog@yahoo.com,” and “JennyandDave@msn.com” were shared. In other instances, for example an email address such as “23skiddoo@hotmail.com,” it might be unclear that the email addresses were shared. However, in ALL cases, spammers such as the Defendant are responsible for complying with the law related to commercial electronic mail, whether they know that a particular email address is shared or not, or whether they know that an email address has been transferred or not. And while the Defendant would like the Court to believe sorting this matter out is material to the Defendant’s claims, it is not. The Defendant’s claims fail as a matter of law whether the emails were received by Mr. Gordon, the Third Party Defendants, or both.

Plaintiff’s Fact #7

In response to commercial emails purporting to offer free products, on or about September 1, 2003, Mr. Gordon requested to receive the free products advertised in these offers. Gordon Declaration, ¶ 8&9

The Defendant has not contested, and therefore has admitted this fact. Further, this fact is consistent with the Defendant’s allegations at ¶ 8-14 of the Defendant’s counterclaims and ¶ 15-21 of the Defendant’s Third Party Claims as set forth in their amended answer.

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Plaintiff's Fact #8

These submissions were made by visiting a website advertised in these emails, and entering an email address and other information into an online form. Mr. Gordon used the following email addresses james@gordonworks.com, faye@gordonworks.com, jamila@gordonworks.com, jay@gordonworks.com, jonathan@gordonworks.com, emily@gordonworks.com Gordon Declaration, ¶ 9

The Defendant has not contested, and therefore has admitted this fact. Further, this fact is consistent with the Defendant's allegations that Mr. Gordon and the Third Party Defendant's signed up to receive email at various websites, as detailed in ¶ 8-14 of the Defendant's counterclaims and ¶ 15-21 of the Defendant's Third Party claims. Indeed, are the sole acts that the Defendant alleges formed any contract between any of the parties in the Defendant's counterclaims and third party claims.

Incongruently, at ¶ 20 and ¶ 47 of the Bodie declaration, the Defendant has now alleged, (for the first time), that Mr. Gordon "fraudulently misrepresented his identity to Impulse in violation of the terms and conditions of ("the Agreement") of the USA Gold Card Program (the "Program")." However, the Bodie declaration is the only place the Defendant has made any allegations related to a "contract" for a "USA Gold Card." Nowhere in the Defendant's answer, counterclaims, and third party claims is there any allegation that Mr. Gordon or any of the Third Party Defendant's ever entered into a "contract" for a "USA Gold Card." Instead, the Defendant's counterclaims and third party claims allege that Mr. Gordon and the Third Party Defendants "opted in to receive emails" at various websites. The

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Plaintiff hereby denies the allegation that the Plaintiff ever entered into a “contract” for a “USA Gold Card.”, but even if this allegation is assumed to be true, it is irrelevant and immaterial to the Defendant’s pleadings.

The “Scheme” referenced in the Bodie declaration is based on the formation of a contract for a “USA Gold Card,” whereas the Defendant’s counterclaims and third party claims are based on the mere act of “opting in” to receive commercial email in exchange for a free gift. As such, the “Scheme” referenced in paragraph 1 of both the Defendant’s counterclaims and the Defendant’s third party claims allege both facts and a legal theory entirely distinct from the “Scheme” referenced in the Bodie declaration.

Accordingly, while the allegations related to a “contract” for a “USA Gold Card” in the Bodie declaration are disputed, they do not raise any questions of material fact. The Defendant has not plead any claims concerning either the formation or breach of the alleged contract for a “USA Gold Card”, and neither its existence and/or its breach is material to the counterclaims or third party claims set forth Defendant’s pleadings.

What the Defendant has alleged is that Mr. Gordon agreed to receive the Defendant’s commercial email (spam) when he signed up to receive free products (that never arrived) on various third party websites. Mr. Gordon admits he requested the products, but has specifically denied that he agreed to receive spam from the Defendant as a term or condition of any of these websites. The Defendant has not contested, or indeed even addressed this fact, as the only “contract”

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referenced in the Bodie declaration is for a “USA Gold Card.” Accordingly, the Defendant has admitted that Mr. Gordon never agreed to receive commercial email from the Defendant as a term or condition of his entering information at any of these websites.

Plaintiff’s Fact #9

Mr. Gordon never received any of the free products advertised in the emails.
Gordon Declaration, ¶ 10

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff’s Fact #10

Nowhere on any of these websites was Mr. Gordon asked to give his consent to receive any commercial email from the Defendant.
Gordon Declaration, ¶ 11

While the Defendant’s counterclaims and third party claims contain allegations contrary to this fact, nowhere in the Defendant’s evidence has the Defendant has set forth the existence of any fact that would supports those allegations. The Defendant has therefore admitted this fact.

Plaintiff’s Fact #11

At no time did Mr. Gordon give his consent to receive any commercial email from the Defendant.
Gordon Declaration, ¶ 11

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The Defendant has contested this fact at paragraph 48 of the Bodie declaration wherein Mr. Bodie states that Mr. Gordon has "repeatedly provided Impulse with his express request to receive the emails at issue…" However, except for those documents included with the declaration of Mr. Philip Huston, the Defendant has not produced or even alleged the existence of a single document evidencing even a single instance of an "express request." Further, the Defendant has not produced or even alleged the existence of any terms and conditions at any of the websites Mr. Gordon did visit that contradict Mr. Gordon's assertion that none of them required his consent to receive emails from the Defendant. Accordingly, while the Defendant's counterclaims, third party claims, and paragraph 48 of the Bodie declaration contain allegations contrary to this fact, nowhere in the Defendant's evidence has the Defendant has set forth the existence of any fact that would supports those allegations. The Defendant has therefore admitted this fact.

Plaintiff's Fact #12

Almost immediately after Mr. Gordon had filled out the online forms which purported to offer free products, Mr. Gordon began to receive a torrent of commercial email from the Defendant at the email addresses Mr. Gordon had used to try to accept the offers for free prizes.

Gordon Declaration, ¶ 12

The Defendant has not contested, and therefore has admitted this fact.

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Plaintiff's Fact #13

Within a few weeks of his requests for free products, Mr. Gordon attempted to stop the resulting torrent of commercial email by unsubscribing from these email lists.

Gordon Declaration, ¶ 13

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #14

In October of 2003, Mr. Gordon began submitting "unsubscribe" requests to the Defendants, and continued to do so through Spring of 2005.

Gordon Declaration, ¶ 14

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #15

Exhibit F of the Declaration of Phil Huston filed with the Court January 21, 2005, shows that the Plaintiff "opted out" of receiving future commercial emails from the Defendant on October 15, 2003.

The Defendant has admitted this fact in part. The Bodie Declaration admits that Exhibit F of the Declaration of Phil Huston shows that the Plaintiff "opted out" of receiving "some" but not "all" future commercial emails from the Defendant. The

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Bodie declaration then states that "a question of fact arises to if and when Gordon and/or his family members "opted-in" again after such "opt-out occurred." However, no question of fact arises merely as a result of the Bodie declaration's idle speculation, and neither the Bodie declaration nor the Plaintiff's complaint allege that "Gordon and/or his family members "opted-in" again after such "opt-out occurred." Accordingly, while the Bodie declaration argues that a question of fact about subsequent "opt-in" exists, it neither alleges as such nor does it present any evidence of such.

Plaintiff's Fact #16

Mr. Gordon's "unsubscribe" requests were ignored, and in fact, the amount of emails Mr. Gordon received increased after these requests were sent.

Gordon Declaration, ¶ 15

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #17

All of the emails that form the basis for Mr. Gordon's lawsuit against the Defendant were received by Mr. Gordon after Mr. Gordon had submitted these "unsubscribe" requests.

Gordon Declaration, ¶ 16

The Defendant has not contested, and therefore has admitted this fact.

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Plaintiff's Fact #18

Throughout the fall of 2003, Mr. Gordon continued to receive emails from the Defendant, and Mr. Gordon brought complaints about this unwanted and ongoing commercial email to the Federal Trade Commission, the Attorney General for Washington State, Tier 1 backbone internet providers, Mr. Gordon's local ISP, and the local, Richland, Washington police department.

Gordon Declaration, ¶ 17

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #19

At the local Richland, Washington police department, Mr. Gordon was put in contact with Officer Lew Reed, a police officer specializing in cybercrimes investigations. Officer Reed personally examined about 2,000 emails sent by the Defendant, and confirmed to Mr. Gordon that information in the transmission paths of the emails in question had been omitted and/or mischaracterized.

Gordon Declaration, ¶ 18

While the Defendant has not contested, and therefore has admitted this fact, the Defendant's brief has argued that Mr. Gordon's declaration contains hearsay.

Plaintiff's Fact #20

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In November of 2004, having confirmed that the emails in question violated RCW 19.190 et seq., and having exhausted all avenues Mr. Gordon could conceive of to stop the sending of this illegal spam to his domain short of litigation, Mr. Gordon brought this suit against the Defendant.

Gordon Declaration, ¶ 19

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #21

Despite all of these efforts, and the fact that Mr. Gordon's lawsuit against the Defendant has been pending for 10 months, to this day the Defendant continues to send Mr. Gordon commercial email that violates RCW 19.190 et seq.

Gordon Declaration, ¶ 20

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #22

In his prior lawsuit against Commonwealth Marketing Group, Inc., Mr. Gordon identified his wife, Mrs. Bonnie Gordon; his children, Mr. James. S. Gordon III, Mr. Jonathan Gordon, and Ms. Jamila Gordon; his friends, Mr. Robert Pritchett, and Ms. Emily Abbey; and Officer Lew Reed as witnesses.

Gordon Declaration, ¶ 21

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The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #23

The Defendant has now sued all of these individuals as "Third Party Defendants," although the Defendant has moved to dismiss Officer Lew Reed.

Gordon Declaration, ¶ 22

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #23

To the extent that Mr. Gordon ever had any conversations with any of the Third Party Defendants related to the commercial emails sent by the Defendant, Mr. Gordon expressed his desire that they stop sending these emails, and his frustration that the Defendant would not.

Gordon Declaration, ¶ 24

The Defendant has not contested, and therefore has admitted this fact.

Plaintiff's Fact #24

To the best of Mr. Gordon's knowledge, at no time have any of the Third Party Defendants ever solicited any of the commercial email to the "gordonworks.com" email addresses that form the basis of this lawsuit.

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Gordon Declaration, ¶ 25

While the Defendant's counterclaims and third party claims contain allegations contrary to this fact, nowhere in the Defendant's evidence has the Defendant has set forth the existence of any fact that would supports those allegations. The Defendant has therefore admitted this fact.

Plaintiff's Fact #25

At no time did any of the Third Party Defendants and Mr. Gordon ever discuss any "scheme" whereby they would solicit any commercial emails to any "gordonworks.com" email address that forms the basis of this lawsuit, as such would have been directly contrary to Mr. Gordon's often stated desire that the Defendant stop sending me commercial email.

Gordon Declaration, ¶ 26

While the Defendant's counterclaims and third party claims contain allegations contrary to this fact, nowhere in the Defendant's evidence has the Defendant has set forth the existence of any fact that would supports those allegations. The Defendant has therefore admitted this fact.

Plaintiff's Fact #26

The Defendant's claims against the Third Party Defendants thus appear to be nothing more than an attempt to harm Mr. Gordon by exposing his friends, family

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and law enforcement witnesses to the costs of defending themselves in civil litigation.

Gordon Declaration, ¶ 27

While the Defendant's counterclaims and third party claims contain allegations contrary to this fact, nowhere in the Defendant's evidence has the Defendant has set forth the existence of any fact that would supports those allegations. The Defendant has therefore admitted this fact.

Defendant's Fact #1

The Defendant has alleged that "to the extent any emails referenced in Gordon's complaint are indirectly attributable to Impulse, said emails were transmitted by CMG."

Bodie Declaration, ¶ 7

While this allegation is not material to any of the Defendant's counterclaims or Third Party Claims, in an abundance of caution, the Plaintiff contests this fact. As evidence that this is not a true fact, the Plaintiff notes that the Exhibit E of the declaration of Phil Huston is a "Website Development and Marketing Services Agreement" between the Defendant and CMG wherein the Defendant undertook responsibility to "provide various marketing services designed to drive traffic to

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CMG's USA Gold Card Website." See paragraph 2. This agreement establishes that it was the Defendant, and not CMG, who sent the emails.

DATED this 30th day of September, 2005

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Certificate of Service

I hereby certify that on September 30, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Floyd Ivey, Peter J. Glantz. I hereby certify that I have served the forgoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III, and Robert Prichett. I hereby certify that I have served the forgoing to the following persons who are non-CM/ECF participants named in this lawsuit, but who have not yet been served or entered an appearance in this lawsuit by other means: Emily Abbey and Jamila Gordon.

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